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Chen Siew Lee v Tan Bak Lee & Anor

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HIGH COURT (PENANG) — DIVORCE PETITION NO PA-33–217–06 OF 2017
AZMI ABDULLAH JC
9 JUNE 2018

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Family Law — Divorce — Ancillary relief — Application for security for costs by petitioner — Respondent failed to pay maintenance and court-awarded costs — Whether court had discretion to order security for costs — Whether it was in order for court to grant security for costs — Law Reform (Marriage and Divorce) Act 1976 s 47 — Rules of Court 2012 O 23 r 1

D

The respondent in the present case was indebted to the petitioner in the sum of RM1,260,000 being the arrears of maintenance as well as the sum of RM144,480 being the total sum of court-awarded costs. Consequently, the petitioner filed the present application ('encl 22') for, inter alia, an order for the respondent to pay a sum of RM100,000 as security for costs on terms as set out therein.

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Held:

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(1) The decision in *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 supported the position that notwithstanding that the facts of a case did not fall within the stated criteria of O 23 r 1(1)(a)–(d) of the Rules of Court 2012 ('the ROC'), the court was still armed with the discretion to order security for costs in a fit and proper case. Further and notwithstanding the provisions in O 23 r 1 of the ROC, there was also s 47 of the Law Reform (Marriage and Divorce) Act 1976 which provided that the court may apply the principles of law set out in the decisions of the English Courts of law (see paras 29–30).

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(2) As the awards of costs and outstanding maintenance due to the petitioner were not in dispute, the onus should be placed on the respondent to show why an order for security for costs ought not to be granted against him. The respondent had failed to make full and frank disclosure of his affairs or to offer any plausible explanation as to why he had failed and/or refused to pay the numerous court awarded costs and arrears of maintenance to the petitioner. In the circumstances, the court found that it was in order for the court to grant an order in terms of encl 22 with the security for costs being fixed at RM50,000 (see paras 36–39).

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[Bahasa Malaysia summary

Responden dalam kes ini berhutang dengan pempetisyen sejumlah RM1,260,000 sebagai tunggakan penyelenggaraan dan juga sejumlah RM144,480 sebagai jumlah keseluruhan kos yang diaward oleh mahkamah. Akibatnya, pempetisyen memfailkan permohonan ini ('lampiran 22') untuk, antara lain, perintah untuk responden membayar sejumlah RM100,000 sebagai sekuriti untuk kos atas syarat-syarat yang ditetapkan di dalamnya.

Diputuskan:

(1) Keputusan dalam kes *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 menyokong kedudukan tersebut meskipun bahawa fakta kes tidak terangkum dalam kriteria A 23 k 1(1)(a)–(d) Kaedah-Kaedah Mahkamah 2012 ('KKM'), mahkamah masih mempunyai budi bicara untuk memerintah sekuriti untuk kos dalam kes yang wajar dan betul. Selanjutnya dan meskipun peruntukan-peruntukan dalam A 23 k 1 KKM, juga terdapat s 47 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 yang memperuntukkan bahawa mahkamah mungkin menggunapakai prinsip-prinsip undang-undang yang ditetapkan dalam keputusan Mahkamah Inggeris undang-undang (lihat perenggan 29–30).

(2) Memandangkan award kos dan penyelenggaraan yang tertunggak kerana pempetisyen tidak mempertikaikan, beban patut diletakkan ke atas responden untuk menunjukkan mengapa perintah untuk sekuriti untuk kos tidak patut diberikan terhadapnya. Responden telah gagal untuk membuat penzahiran yang penuh dan terbuka mengenai urusannya atau untuk memberikan apa-apa penjelasan munasabah mengapa dia telah gagal dan/atau menolak untuk membayar banyak sekali kos yang diawardkan oleh mahkamah dan tunggakan penyelenggaraan kepada pempetisyen. Dalam keadaan, mahkamah mendapati bahawa untuk mahkamah memberikan perintah seperti dikehendaki dalam lampiran 22 dengan sekuriti untuk kos ditetapkan RM50,000 (lihat perenggan 36–39).]

Notes

For cases on ancillary relief, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4134–4142.

Cases referred to

Faridah Begum bte Abdullah v Dato' Michael Chong [1995] 2 MLJ 404, HC (refd)

Kemp-Welch v Kemp-Welch and Crymes [1910] P 233, CA (refd)

Lina Soo (f) v Ngu Chu Chiong @ Ngu Choo Chiong & Anor [1999] MLJU 442, HC (refd)

Robertson v Robertson and Favagrossa [1881–85] All ER Rep 318, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 47
Rules of Court 2012 O 23 r 1, 1(1)(a), (1)(b), (1)(c), (1)(d)

Daphne Choy (Choy & Assoc) for the petitioner.
Amirah bt Abdullah (Tan Bak Lee & Co) for the respondent.

Azmi Abdullah JC:

[1] The matter came up for hearing on 26 April 2018 of the petitioner's notice of application for ancillary reliefs dated 7 November 2017 (encl 22) for, amongst other things, an order for the respondent to pay a sum of RM100,000 as security for costs on terms as set out therein.

[2] The parties have filed the following affidavits in respect of encl 22:

(a) affidavit in support of Chen Siew Lee affirmed on 7 November 2017;

(b) affidavit of Tan Bak Lee affirmed on 27 November 2017; and

(c) affidavit in reply of Chen Siew Lee affirmed on 9 February 2018.

[3] This court on the same date decided to allow security of costs to be paid to the petitioner to the sum of RM50,000 against which an appeal has been lodged to the Court of Appeal hence this grounds of judgment.

BACKGROUND FACTS

[4] On 14 December 1978, the petitioner was lawfully married to Tan Bak Lee, the abovenamed respondent ('the respondent'), at Pejabat Pendaftaran Perkahwinan Awam, Daerah Timur Laut, Pulau Pinang.

[5] There are two children of the marriage now living namely:

(a) Tan Ching Lin (NRIC No 810125-07-5159), male, born on 25 January 1981, aged 37 years old; and

(b) Tan Ching Yu (NRIC No 900924-07-5111), male, born on 24 September 1990, aged 27 years old ('the children').

[6] The said marriage has broken down irretrievably as the respondent has allegedly behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent and on grounds as set out in the divorce petition filed herein. The two parties have had a long and very storied legal proceedings fought in the court rooms of the Penang High Court.

[7] By an order of the High Court given on 17 May 2012 under Penang High Court Originating Summons No 24–1979–10 of 2011, it was ordered that the abovementioned respondent do pay to the petitioner the following:

(a) a sum of RM15,000 per month as maintenance to be calculated from May 2010 which payment shall be due by or before the seventh of every month until further order (para (i) of the said order);

(b) that the respondent shall pay to the petitioner a sum of RM10,000 by or before 31 January of every year with effect from June 2012 being her expenses for her annual holiday (para (ii) of the said order);

(c) that the respondent shall pay to her a sum of RM20,000 by or before 31 March of every year with effect from June 2012 being her expenses for her trips to visit the two children of the marriage in Australia and England (para (iii) of the said order); and

(d) a sum of RM6,000 as costs of the proceedings (para (iv) of the said order).

A copy of the said order dated 17 May 2012 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL1'.

[8] Upon the respondent's appeal to the Court of Appeal, the petitioner had consented to the deletion of para (iii) in the said order dated 17 May 2012 for the respondent to pay to her a sum of RM20,000 by or before 31 March of every year with effect from June 2012 being the respondent's expenses for her trips to visit the two children of the marriage in Australia and England. However, the rest of the respondent's appeal against the said order dated 17 May 2012 was dismissed with costs. A copy of the order of the Court of Appeal dated 20 March 2014 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL2'.

[9] On 3 July 2012, the petitioner's solicitors had on her instructions sent a letter to the respondent's solicitors, Messrs Tung, Chan & Partner to give notice to the respondent to settle the sum of RM281,936.72 as of that date. A copy of the petitioner's solicitors' said letter dated 3 July 2012 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL3' but until to date there has been no reply to the petitioner's solicitors' said letter of 3 July 2012.

[10] The petitioner further on had on 30 October 2012 obtained an order from the High Court to garnish the respondent's bank accounts. A copy of the said order dated 30 October 2012 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL4'.

The petitioner however, had only managed to recover a sum of RM253.04 from CIMB Bank Bhd pursuant to the said order of 30 October 2012. A

[11] As at April 2017, the respondent is indebted to the petitioner in the sum of RM1,260,000 being the arrears of maintenance and such arrears continue to accrue as the respondent continues to refuse paying her the maintenance as ordered by the court. B

[12] Since May 2010, the respondent has been settling the monthly loan installments of RM4,168 only due to Public Bank as mortgage payments for the property known as Hakmilik Strata No Berdaftar Geran 61829/M2/15/76, No Petak 76, Tingkat No 15, Bangunan No M2, Petak-petak Aksesori No A151 & A162, Lot No 4082, Bandar Tanjong Bungah, Daerah Timur Laut, Negeri Pulau Pinang ('the said property') with the petitioner at all material times residing at the said property. C D

[13] Other than the said monthly installments of RM4,168 due to Public Bank, the respondent has not paid the petitioner any money pursuant to the said order dated 17 May 2012 for maintenance even after it was affirmed by the Court of Appeal on 20 March 2014. E

[14] However, since April 2015, the respondent has stopped paying even the monthly loan installments to Public Bank and the petitioner has had to sell the said property to avoid foreclosure and also to obtain money for her living expenses. When told of the petitioner's move to sell the said property, the respondent lodged successive caveats on the said property to thwart her efforts to obtain money for herself. F

[15] The petitioner had to file an action under Penang High Court Originating Summons No PA-24NCVC-353–04 of 2017 to remove the respondent's said caveats. Copies of the orders dated 31 July 2017 and 13 October 2017 under Penang High Court Originating Summons No PA-24NCVC-353–04 of 2017 are annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibits marked 'CSL5' and 'CSL6' respectively. G H

[16] The respondent has also failed to pay the costs awarded to the petitioner by the court in pursuant of the following actions: I

(i) Court of Appeal Civil Appeal No P-02–1376–06 of 2012: a sum of RM26,000 under the order dated 20 March 2014 in dismissing the respondent's appeal against the order of the High Court for maintenance. A copy of the said order dated 20 March 2014 has been

annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL2';

(ii) Court of Appeal Civil Appeal No P-03(1M)-132–12 of 2014: a sum of RM10,000 under the order dated 7 April 2015 in allowing the petitioner's appeal in respect of her application for security for costs. A copy of the said order dated 7 April 2015 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL7';

(iii) Penang High Court Divorce Petition No 33–55–01 of 2013: a sum of RM100,000 under the order dated 23 April 2015 in striking out the divorce petition. A copy of the said order dated 23 April 2015 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL8';

(iv) Penang High Court Originating Summons No PA-24NCVC-353–04 of 2017:

(a) a sum of RM8,000 together with allocatur fee of RM320 under the order dated 31 July 2017 in allowing the petitioner's originating summons for removal of caveat. A copy of the said order dated 31 July 2017 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL5'; and

(b) a sum of RM2,000 together with allocatur fee of RM80 under the order of 13 October 2017 in allowing the petitioner's notice of application (encl 18) for consequential orders. A copy of the draft order dated 13 October 2017 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL6'; and

(v) Penang High Court Civil Suit No PA-22NCVC-93–05 of 2017 (converted from Penang High Court Originating Summons No PA-24NCVC-941–10 of 2015): a sum of RM2,000 as costs awarded together with allocatur fee of RM80 under the order dated 17 October 2017. A copy of the draft order dated 17 October 2017 is annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL9'.

[17] After deducting a sum of RM4,000 awarded by the court to the respondent pursuant to the order dated 19 August 2016 under Penang High Court Originating Summons No 24NCVC-941–10 of 2015 in dismissing the petitioner's notice of application to strike out action, the total sum of court awarded costs due to the petitioner as at the filing of encl 22 is RM144,480.

[18] The petitioner's solicitors had on 12 October 2017 written to the respondent's solicitors to demand the then total sum of costs of RM140,320 which was before the granting of the orders of 13 October 2017 and 17 October 2017 as set out in paras 16(iv)(b) and 16(v) hereinabove. A copy of the letter dated 12 October 2017 from Choy & Assoc to Tan Bak Lee & Co has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL10' but to-date, there has been no reply from the respondent's solicitors to the petitioner's solicitors' said letter dated 12 October 2017.

[19] As there is a precedent for security for costs specifically between the respondent and the petitioner in Penang High Court Divorce Petition No 33–55–01 of 2013 and Court of Appeal Civil Appeal No P-03(1M)-132–12 of 2014 (exhs 'CSL8' and 'CSL7' annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017), the petitioner submits that this honourable court ought to grant the petitioner security for costs in the same terms as ordered in the two said orders.

[20] This court though is the considered opinion that the respondent has the resources to settle the sum of maintenance as ordered as he had in para 7(i) his affidavit affirmed on 10 May 2012 filed under Penang High Court Originating Summons No 24–1979–10 of 2011 averred that he had deposited a sum of RM850,000 between 1 January 2007 and 30 June 2010 being the balance of his net income. The relevant part of the said affidavit is reproduced as follows:

> Plaintif pada masa material bukanlah seorang yang tidak mempunyai sebarang sumber untuk menampung hidupnya kerana semenjak 11112007 sehingga 301612010 saya telah mendepositkan ke dalam akaun bersama Malayan Banking Berhad wang sejumlah RM850,000.00 daripada baki bersih pendapatan saya tersebut di atas yang mana telah dicadangkan sebagai simpanan bersama dan bagi perbelanjaan Plaintif yang munasabah.

A copy of the said affidavit of Tan Bak Lee affirmed on 10 May 2012 has been annexed to the affidavit in support of Chen Siew Lee affirmed on 7 November 2017 as exhibit marked 'CSL11'.

[21] The petitioner has however explained in her affidavits filed in the High Court that a substantial portion of the monies paid by the respondent into their joint bank account has already been disbursed to pay for the educational expenses of the younger child of the marriage, Tan Ching Yu, in the United Kingdom.

[22] Although the respondent is an advocate and solicitor, it can be gathered from his conduct thus far that he has no intention of complying with the said order of 17 May 2012 and/or any of the costs awarded to the petitioner and has to date made no effort to pay her any maintenance or given any explanation as

to the reason why he has not done so. The respondent has also been filing multiple actions against the petitioner probably calculated to put pressure on her to settle her claim for the matrimonial assets cheaply.

[23] The petitioner has in para 16 of the Affidavit in support of Chen Siew Lee affirmed on 7 November 2017 that the respondent has stopped paying even the monthly loan installments to Public Bank and she has had to sell the said property to avoid foreclosure and also to procure money for her living expenses.

[24] From the respondent's conduct so far, the petitioner would probably not be able to recover any costs in these proceedings in the event she is successful unless the respondent pays the requested sum of money as security for costs.

[25] It is to be noted that the requested security of RM100,000 in encl 22 is not even sufficient to cover the total sum of RM144,480 being the court awarded costs due to her as at the filing of encl 22 herein, and the sum of RM1,260,000 being the outstanding maintenance as at April 2017.

APPLICABLE LAW

[26] Order 23 r 1 of the Rules of Court 2012 ('ROC') provides:

> 1 Security for costs of action
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> (1) Where, on the application of a defendant to an action or other proceedings in Court, it appears to the Court —
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction;
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;
>
> (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or originating summons or is incorrectly stated therein; or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation;
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.
>
> (2) ...
>
> (2A) ...
>
> (2B) ...

(2C) ...

(3) The references in the foregoing paragraph to a plaintiff and a defendant shall be construed as references to a person (howsoever described on the record) who is in the position of the plaintiff or defendant, as the case may be, in the proceedings in question, including the proceedings on a counterclaim.

[27] From a literal reading, O 23 r 1 of the ROC does not provide expressly for a situation such as the instant case. However, it is clear from case precedents that the absence of an express provision in the ROC does not preclude the petitioner from making the application in the circumstances as set out in encl 22 herein.

[28] Arifin Zakaria J (as he then was) held in *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 that notwithstanding the provisions in O 23 r 1 of the Rules of Court:

... there is nothing either in the [Bankruptcy] Act or in the RHC which takes away the discretion of the court under O 23 to order security for costs in a fit and proper case ...

[29] This court is of the considered opinion that the decision in *Faridah Begum* supports the position that notwithstanding that the facts of a case does not fall within the stated criteria of O 23 r 1(1)(a)–(d), the court is still armed with the discretion to order security for costs in a fit and proper case.

[30] Further and notwithstanding the provisions in O 23 r 1 of the ROC, there is also s 47 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') which provides that this honourable court may apply the principles of law set out in the decisions of the English courts of law. Section 47 of the LRA is reproduced as follows:

47 Principles of law to be applied

Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

[31] Arifin Zakaria J's expansive approach in *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 was adopted by the court in *Lina Soo (f) v Ngu Chu Chiong @ Ngu Choo Chiong & Anor* [1999] MLJU 442, where Muhammad Kamil J, had pursuant to s 47 of the Act, adopted the principles laid down in English cases on the issue of security for costs. His Lordship held also:

O 23 r 1 of the Rules of the High Court 1980 gives the court the jurisdiction and the discretionary powers to order security for costs as the court thinks just and on such terms as the court may direct.

[32] In *Lina Soo (f) v Ngu Chu Chiong @ Ngu Choo Chiong & Anor* [1999] MLJU 442, Muhammad Kamil J had cited passages from several English cases including *Kemp-Welch v Kemp-Welch and Crymes* [1910] P 233 (CA). In *Kemp-Welch v Kemp-Welch and Crymes*, Cozens-Hardy MR quoted Sir George Jessel in *Robertson v Robertson and Favagrossa* [1881–85] All ER Rep 318 as follows:

> Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into Court, and finally by payment of the proper costs incurred when the suit was heard.

[33] Also quoted in *Lina Soo (f) v Ngu Chu Chiong @ Ngu Choo Chiong & Anor* [1999] MLJU 442, is the following passage from *Kemp-Welch v Kemp-Welch and Crymes* where Kennedy LJ, held as follows:

> The case of *Hurley v Hurley and Menzies* (1) has been cited to us, and I desire to say that in my opinion the judgment of Collins J, who was then sitting in that Division, is a good illustration of the view which ought to be maintained in the Divorce Court. In that case there had been a petition by the husband for divorce; the jury had disagreed and were discharged without giving a verdict, as here. The Court, on the application of the wife, made an order that her costs of the hearing should be taxed and paid in full, and refused to limit such costs to the amount deposited in Court. I desire to read a few words from the commencement of the judgment. Collins J. said (2): 'I think the wife is entitled to the order asked for. *The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on in litigation,* and the practice has been for the registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it. If he has made an accurate estimate, so much better for the wife; but if his estimate is found insufficient when the trial comes on the practice is to enlarge the amount paid in by the husband, so that the wife may continue to be in funds, and to that she is entitled although the result may be that she is divorced. *The practice, therefore, seems to me to be that the husband is bound to furnish the estimated amount for the wife's costs entirely independent of the result*'. That being so, and there being, as I have said, an order for payment of these costs, *it is right, and in accordance not only with the practice of the Divorce Court but with what I may call general judicial discretion, that this wife should not be put to further trial without her costs of the first trial being either paid or secured to her.*

[34] The petitioner's application is almost identical to the facts in *Kemp-Welch v Kemp-Welch and Crymes* in that the total sum of court-awarded costs due to the petitioner as at the filing of encl 22 is RM144,480 which sum

remains unpaid in addition to the sum of RM1,260,000 being the outstanding maintenance as at April 2017.

[35] Having regard to the above grounds, this court agrees that the petitioner wife ought not to be exposed to further costs in litigation until she has been paid the awards of costs and maintenance or be provided security for costs by the respondent.

CONCLUSION

[36] As the awards of costs and outstanding maintenance due to the petitioner wife are not in dispute, the onus should be placed on the respondent husband to show why an order for security for costs ought not to be granted against him.

[37] The respondent husband also has not been bona fide and candid in his affidavits in that he has failed to show the current accounts of his law practice under the name and style of Tan Bak Lee & Co to disclose his real income and expenditure.

[38] The income statements annexed to the affidavit of Tan Bak Lee affirmed on 27 November 2017 as exh 'TBLK' are not current as they reflect the respondent's income for the years of assessment of 2007, 2008, 2009 and 2010 only. It is apparent that, the respondent has failed to make a full and frank disclosure of his affairs or to offer any plausible explanation as to why he has failed and/or refused to pay the numerous court-awarded costs and arrears of maintenance to the petitioner.

[39] In the circumstances, this court finds that it is in order for this honourable court to grant an order in terms of the petitioner's notice of application for ancillary reliefs dated 7 November 2017 (encl 22) with the security for costs being fixed at RM50,000.

Order in terms of encl 22.

Reported by Dzulqarnain Ab Fatar